SUPREME COURT, U. S. 653

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IN THE

Supreme Court of the United States

October Term, 1967

FROHMAN HOLLAND, IRVING HOLLAND, HARVEY MILLER, ROBERT SAUNDERS, BERT GILBERT, on their own behalf and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

RICHMOND KOTCHER, NORTON KOTCHER, DAVID GIMPEL and JACK SACKS,

Intervenor Plaintiffs-Appellants,

MICHAEL W. CAMMAROSANO and EDWARD BRENNAN and all other officers and employees of the Borden Company,

Intervenor Plaintiffs,

against

FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,

Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor Defendant-Appellee.

APPELLANTS' JURISDICTIONAL STATEMENT ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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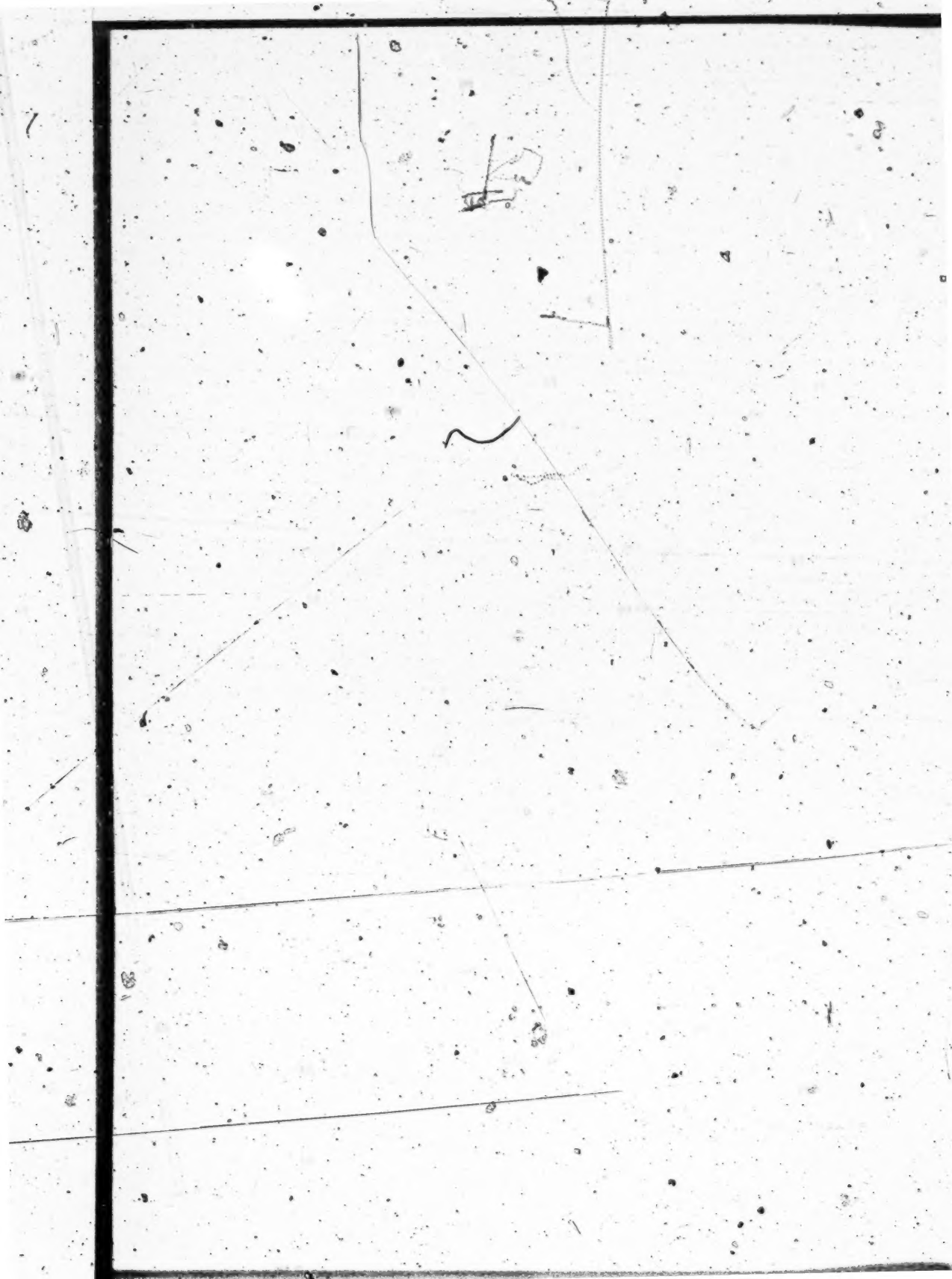

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LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor Defendant-Appellee.

APPELLANTS' JURISDICTIONAL STATEMENT ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This jurisdictional statement is submitted on behalf of Plaintiff-Appellants, Frohman Holland, Irving Holland,

Harvey Miller, Robert Saunders, Bert Gilbert, on their own behalf and on behalf of all other persons similarly situated, and Intervenor Plaintiffs-Appellants Richmond Kotcher, Norton Kotcher, David Gimpel and Jack Sacks,[1] in support of their appeal to this Court from the Order of the United States District Court for the Southern District of New York denying plaintiffs' motion for a preliminary injunction and for summary judgment and staying this action pending resort to state court proceedings by the plaintiffs and/or their corporations, which Order was entered in this action on June 27, 1967.

Opinion Below

The opinion of the Court below is reported in —— F. Supp. —— (S.D.N.Y. 1967) and is reprinted herein at Appendix A.

Jurisdiction

(i) This is an action brought under 42 U.S.C. §1983 to enjoin defendants under color of New York State statutes, ordinances, regulations, customs, and usages from subjecting or causing to be subjected, plaintiffs and other persons similarly situated to the deprivation of their rights, privileges, and immunities secured by the Constitution of the United States, and more particularly, their rights under the Fifth and Fourteenth Amendments to the United States Constitution not to incriminate themselves. Said action specifically sought an interlocutory and permanent injunc-

1. Since both the original plaintiffs and the intervenor plaintiffs who join in this appeal are in the identical position, this jurisdictional statement will refer to both groups as plaintiffs.

tion restraining the enforcement, operation, and execution of certain New York statutes described below by restraining the action of the defendants as officers of New York State in the enforcement or execution of those statutes. Plaintiffs' motion for an interlocutory injunction and summary judgment was referred to a three-judge court convened by order of Judge William B. Herlands dated April 14, 1967 pursuant to the provisions of 28 U.S.C. §§2281, 2284.

(ii) The Order sought to be reviewed was dated and entered on June 27, 1967. The Notice of Appeal therefrom was filed with the Clerk of the United States District Court for the Southern District of New York on July 26, 1967.

(iii) This Court has jurisdiction of this appeal by virtue of 28 U.S.C. §1253.

Statutes Involved

Plaintiffs rely upon the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs' action was brought pursuant to 42 U.S.C. §1983. The statutes involved herein are Sections 103-b of the New York State General Municipal Law, 139-b of the New York State Finance Law, and 2602 of the New York State Public Authorities Law.[2] The constitutional provisions and statutes involved are set forth in Appendix B hereof.

2. The wordings of these three statutes are virtually identical except that 103-b refers to contracts with New York State municipal corporations and fire districts, 139-b refers to contracts with the State of New York and 2602 refers to contracts with New York State Public Authorities. For convenience, we will generally refer to 103-b alone but any discussion of that statute applies with equal force to the other two statutes attacked herein.

Questions Presented

(i) Was the three-judge District Court correct in abstaining from deciding the merits of this case and ordering a stay of this action, without any proceeding involving these parties pending in New York State Courts, in view of: the federal constitutional rights of plaintiffs which are involved herein; the irreparable injuries to plaintiffs inflicted by the state conduct complained of herein; and the nature of the state statutes attacked herein as unconstitutional?

(ii) Assuming that the District Court should not have abstained, are the statutes attacked herein constitutional under the Fifth and Fourteenth Amendments to the United States Constitution?

(iii) Assuming that the statutes attacked herein are constitutional, are the activities of defendants enjoinable insofar as they were not mandated by the statutes attacked herein and do such activities constitute unauthorized deprivation of plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution?

Statement

This case involves coercion used by the District Attorney to attempt to compel businessmen to waive their rights against self-incrimination when subpoenaed before a grand jury and the penalty invoked by other public officials when the businessmen refused to waive their rights. The District Attorney and other public officials purportedly acted pursuant to a state statute.

Each plaintiff is an officer or director of one or more milk companies engaged in the processing, sale and dis-

tribution of milk in the metropolitan New York area. Each was subpoenaed to appear before the Third March 1967 Grand Jury of the County of New York pursuant to an investigation initiated by the District Attorney of the County of New York. Previously, two other milk company executives had been subpoenaed to appear before that Grand Jury and asked to sign a general waiver of immunity. Upon their refusal to do so, no action was taken by the District Attorney to coerce them to testify.

Subsequently, however, when the plaintiffs and other milk executives appeared pursuant to subpoena and before they entered the grand jury room, an assistant district attorney presented each of them with an unlimited waiver of immunity printed on a form containing the naked reference that the waiver of immunity was "pursuant to Section 103-b of the General Municipal Law." The statute and its sister statute barred persons refusing to testify concerning transactions and contracts with public agencies from public contracts for a five year period. The ban includes corporations of which such persons are officers and directors. Upon advice of counsel, plaintiffs and a number of other milk executives informed the assistant district attorney that they would not sign the unlimited waiver of immunity form. The District Attorney never offered the witnesses a waiver of immunity limited to transactions or contracts had with public agencies although Section 103-b and its sister statutes apply only to testimony "concerning any transaction or contract" with the public agencies specified therein.

Knowing that the milk executives would refuse to sign an unlimited waiver, assistant district attorneys nevertheless paraded them before the Grand Jury and confronted them with the dilemma whether or not they would sign the

same unlimited waiver of immunity form. An assistant district attorney threatened each witness in front of the Grand Jury that if he persisted in his refusal he and any firm with which he is associated with would be disqualified from doing business with the City and State of New York for a period of five years.

The context of these threats varied greatly. Nineteen of the milk executives were simply told that the Grand Jury was conducting an investigation to determine whether the crimes of conspiracy, coercion, extortion, bribery of labor union representatives, bribery of a public official and bid-rigging (otherwise unspecified) among other crimes, had been committed in relation to the processing and distribution of milk in the New York City area during the past two or three years. The assistant district attorney did not furnish the witness with any particulars about the alleged bid-rigging or even whether it concerned a contract with a public agency covered by Section 103-b.

After the commencement of this action on March 30, 1967, three other milk executives were told by an assistant district attorney that the Grand Jury was investigating the crimes of conspiracy to rig bids on *public* contracts, extortion, bribery, and other violations of the New York Penal Law relating to public contracts for the sale and purchase of milk products by the City of New York and other government agencies, and that the witnesses' testimony was desired in relation to that inquiry.

Thus the history of the Grand Jury proceedings indicates a gradual awakening of the District Attorney to the availability of Section 103-b as a means to coerce witnesses and how to colorably satisfy its statutory requirements. The first two witnesses were not threatened with 103-b at all. The next group of nineteen witnesses were threatened

with 103-b, but the District Attorney failed to indicate to these witnesses that the Grand Jury investigation was one which allowed the use of 103-b. It was not until the instant action was instituted that the District Attorney at last apprised the final three witnesses that the investigation concerned public contracts covered by Section 103-b.

But the District Attorney's education concerning Section 103-b did not extend to the witnesses' rights thereunder. Plaintiffs have alleged, and defendants have not denied, that none of the witnesses threatened with Section 103-b was asked to sign a waiver limited to testimony concerning transactions or contracts covered by Section 103-b.

Instead, they were each confronted with unlimited waivers covering every crime set forth in the New York Penal Law whether or not they involved transactions or contracts with public agencies.[3]

Following the refusal of the plaintiffs to sign unlimited waivers of immunity, the District Attorney wrote letters dated March 27, 1967 to the Governor of the State of New York, the Mayor of the City of New York, and various State and City agencies, including the New York City Department of Purchase (of which defendant Samuel Adler is Director of Purchasing), informing them that the plaintiffs had refused to sign waivers of immunity pursuant to Section 103-b, the effect of which was to "black list" them from public contracts for a five year period.

On March 29, 1967, defendant Adler upon examining the bids for monthly contracts to supply milk and cream to

3. Although the District Court opinion indicates that after the first two witnesses were called, "the inquiry was narrowed to the subject of municipal and state contracts and possible crime committed in connection with them", this is incorrect. This assertion is made upon the basis that subsequent to the Disctrict Court opinion, the Grand Jury handed down indictments against a number of milk executives subpoenaed after the purported narrowing, which alleged misdemeanors having nothing to do with public contracts.

various city institutions during the month of April 1967, ascertained that two of the bidding companies employed officers named in the District Attorney's letter—Queensboro Farm Products, Inc. (hereinafter referred to as "Queensboro") and Weissglass Gold Seal Dairy Corp. (hereinafter referred to as "Weissglass")—and were low bidders for city contracts for three specified groups of city institutions.[4]

On March 30, 1967, this action was initiated by the original plaintiffs,[5] including plaintiff Harvey Miller, the President of Queensboro. Plaintiffs immediately sought a temporary restraining order from District Court Judge Frederick v. P. Bryan. At the hearing on plaintiffs' application, Morgan Lipton, Assistant Corporation Counsel of the City of New York, representing defendant Adler, stated to Judge Bryan that Section 103-b was self executing and that under its terms the City was forced to disregard the bids of Queensboro, Weissglass, and all other milk companies named in the District Attorney's letter. Judge Bryan denied plaintiffs' request for a temporary restraining order and thereafter defendant Adler, acting upon Mr. Lipton's then view of Section 103-b, disqualified Queensboro and Weissglass and awarded those contracts

4. New York City conducts monthly bidding for contracts to supply certain city institutions, principally its hospitals, with milk and cream for the forthcoming month. The bidding is by a geographic grouping of city institutions established by the Department of Purchase. Of course the terms of 103-b and its sister statutes extend to all contracts with all public agencies as well as these monthly contracts.

5. The original plaintiffs sued on their own behalf and on behalf of all other persons similarly situated. The complaint was described by the three-judge District Court as containing "the conventional allegations for a class action under Fed. R. Civ. P. 23." Subsequently six other plaintiffs intervened herein.

to the next lowest bidder—National Dairy Products Corporation (Sealtest Foods Division).

Judge Bryan, however, signed an order to show cause bringing on an application to convene a three-judge court pursuant to the provisions of Sections 2281 and 2284 of Title 28 of the United States Code to determine plaintiff's motion for a temporary injunction and summary judgment. This application came on to be heard before District Judge William B. Herlands. By that time, Mr. Lipton had changed his position about the meaning of Section 103-b. Before Judge Herlands, on the application for the three-judge court, Mr. Lipton argued that Section 103-b did not mean what it appeared to say on its face—that persons availing themselves of their constitutional prerogative not to sign waivers of immunity were *automatically* deprived of the right to do business with the City and State of New York for five years. Instead, Mr. Lipton construed the statute as allowing the City of New York to hold hearings before a Board of Responsibility[6] to determine whether such person or a corporation of which he is an officer or director, should "be disqualified pursuant to Section 103-b." In conformity with Mr. Lipton's second interpretation, the then New York City Commissioner of Purchase, Richard Lewisohn, submitted an affidavit indi-

6. Boards of Responsibility are provided for by a resolution of the New York City Board of Estimate. Such a board consists of representatives of the City Comptroller, the City Corporation Counsel (customarily Mr. Lipton) and the city agency making the contract (here the Department of Purchase). Such a board has power to authorize that a low bid be disregarded by finding the bidder "not responsible". As Mr. Lipton admitted in oral argument, Boards of Responsibility are not convened for every bid but only where there are grounds for believing the low bidder not to be responsible.

cating that this was the procedure his department was following.

On April 14, 1967 Judge Herlands determined that a substantial constitutional question had been raised and accordingly ordered that a three-judge court be convened. The court so convened held its hearing on May 4, 1967. But by that time, Mr. Lipton had changed his position once again. This time he argued irrespective of what Section 103-b meant, it would not now be enforced in accordance with its express terms. Rather the City would call a Board of Responsibility to determine whether a corporation is not a "responsible bidder" because one of its officers or directors refused to sign a waiver of immunity. If the Board concluded that the bidder was not "responsible" the bidder would be barred from public business. Mr. Lipton submitted an affidavit from the new Acting Commissioner of the Department of Purchase, Marvin Gersten, indicating that his Department was then following Mr. Lipton's third interpretation of the effect of Section 103-b.

At the oral argument before the three-judge court, Mr. Lipton admitted that Boards of Responsibility were not automatically convened for every bid but were called only when there was some special reason to do so. Under Mr. Lipton's latest interpretation of Section 103-b, therefore, the exercise of a person's constitutional prerogative not to sign a waiver of immunity would occasion the calling of a Board of Responsibility at which the person and his corporation could "explain the refusal to waive immunity".[7] Failing to "explain" results in a disqualification to do public business.

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7. At the oral argument, the Attorney General of the State argued that a hearing was not required under 103-b; that 103-b automatically disqualified the bidder. His interpretation was subsequently adopted by the New York Court of Appeals, as will be set forth below.

To illustrate that the City's latest procedure is but the use of Section 103-b in a different guise, plaintiffs submitted the transcript of a Board of Responsibility hearing on the low bids of Dairymen's League Cooperative Association, Inc. (hereinafter referred to as Dairymen's League) for the May requirements of milk and cream at certain institutions operated by the City of New York. Although not technically convened under Section 103-b,[8] the Board of Responsibility was convened after certain Dairymen's League *employees* refused to sign waivers of immunity before the Grand Jury. The transcript indicates that the convening was occasioned by that fact, and that fact alone. One of the Dairymen's League employees who had previously exercised his constitutional rights before the Grand Jury was asked a myriad of detailed factual questions which were precisely the type of questions which would have been asked by the District Attorney before the Grand Jury had the employee not availed himself of his constitutional rights. On the basis of its employee again declining to waive his constitutional rights at this hearing, Dairymen's League, although the low bidder, was declared by the Board "not responsible" and denied the contract to furnish certain City institutions with milk and cream during May 1967.[9]

Similarly, Weissglass was called before a Board of Responsibility to determine whether it was "responsible" so as to receive a contract to deliver milk and cream to City institutions during May 1967. Although Weissglass ap-

8. By its terms, 103-b applies only to corporations in which a witness who refuses to waive immunity is an officer or director and not a mere employee.

9. Dairymen's League subsequently instituted a special proceeding in the New York Courts to review this determination. Its petition was dismissed and that determination has been noticed for appeal.

parently answered all questions put before it, it did not receive that contract. In the case of both Dairymen's League and Weissglass, the contracts went to the next bidder—National Dairy Products Corporation. The Corporation Counsel has attempted to present plaintiffs with a moving target. Each time plaintiffs attacked 103-b, the Corporation Counsel attacked it in a different way and he argued to the three-judge court that he be permitted to do so until he found a way to construe it constitutionally.

While this action was pending, the District Attorney's investigation received wide coverage in the New York City press. In particular, plaintiffs' names and that of their companies were listed as having refused to testify and hence blacklisted under 103-b from receiving state and city contracts. Their names were also coupled with statements by the District Attorney charging numerous violations of law prejudicial to the interests of New York City consumers. No action of any sort has been taken with respect to the District Attorney's flamboyant charges of unsafe milk and bid-rigging on public contracts.

On June 27, 1967, the three-judge court handed down its decision denying plaintiffs' motion for a temporary injunction and for summary judgment. The court stayed this action pending any possible resort to State court proceedings to be instituted by plaintiffs herein and/or their corporations.

In the course of its opinion, the three-judge court referred to two cases, to which none of the instant plaintiffs was a party, then pending before the New York State Court of Appeals—*Gardner* v. *Broderick* and *Matter of George Campbell Painting Corp.* v. *Reid*. Both of these cases were decided on July 7, 1967, after the decision of the three-judge court.

In *Gardner* v. *Broderick*, 20 N.Y. 2d 227 (1967), the Court of Appeals sustained the discharge of a New York

City policeman for refusing to waive immunity pursuant to Section 1123 of the New York City Charter which, in language similar in effect to 103-b, requires the discharge of any City employee who refuses to waive immunity when called before a Grand Jury to testify as to, or to answer any question regarding, official conduct of any officer or employee of the City or of the County.

In *Campbell* v. *Reid*, 20 N.Y. 2d 370 (1967), the Court of Appeals considered the constitutionality of Section 2602 of the New York Public Authorities Law, one of the statutes attacked herein, under which the plaintiff therein had been disqualified from receiving a painting contract from the New York City Housing Authority. The Court of Appeals held that statute to be constitutional simply by citing the *Gardner* case. It went on to hold that the statute barred the plaintiff therein from receiving public contracts although the person who had refused to sign the waiver of immunity had resigned his corporate position prior to his appearance before the Grand Jury. In contrast to the opinion of the three-judge court which stated that plaintiffs had a variety of state remedies available, the New York Court of Appeals held that plaintiff's only state remedy was under Section 2603 of the Public Authorities Law[10] which section presumes that there is some impropriety in refusing to waive one's constitutional prerogative.

Significantly, the plaintiff in *Campbell* was barred from receiving the Housing Authority contract without a hearing of any kind. Thus the Court of Appeals rejected Mr. Lipton's last two interpretations of 103-b and accepted

10. The comparable statute is 103-c reprinted in Appendix B.

his first view that 103-b is an automatic five-year ban from doing business with New York public agencies, and that as such—it is constitutional. Since New York City acted in accordance with "the automatic disqualification" interpretation by disqualifying two companies from April contracts without a hearing and that interpretation has been adopted by the New York Court of Appeals, the question of the constitutionality of 103-b on its face is ripe for determination by this Court.

The Questions Presented Are Substantial

1. Abstention

In brief, plaintiffs asked the District Court to enjoin enforcement of a New York State statute infringing their right not to incriminate themselves protected by the Fifth and Fourteenth Amendments to the Constitution and they demonstrated that this statute has created irreparable injury to themselves directly and indirectly to themselves through their corporations. Despite this, the District Court abstained and told plaintiffs to seek their remedy in State court. Such a decision raises grave questions concerning the entire abstention doctrine and its applicability to such a situation.

A. *The Subsequent History of the Statute.* Since the decision of the District Court, the New York Court of Appeals has construed 103-b by its decision in the *Campbell* case, *supra*. That decision interpreted 103-b as meaning precisely what it said—asserting one's constitutional right against self-incrimination is an absolute bar under that statute to the receipt of any public contracts for a five-year period without any requirement of an administrative hearing and with the banned company's right of re-

view restricted to its limited and patently inadequate rights under section 103-c. If there were any grounds for abstention prior to *Campbell* they evaporated with that decision. The highest court of the State of New York has spoken definitively about the statute's constitutionality and construction and hence there is no further reason for delay in a federal adjudication of the statute's constitutionality as construed by the New York Court of Appeals.

This was the precise holding of the United States Court of Appeals for the Second Circuit (by a panel including Circuit Judge Leonard Moore, one of the judges herein) in *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation* (2nd Cir. Docket No. 31014, September 20, 1967). That case arose out of the discharge of a number of New York City Sanitation Department employees for exercising their rights against self-incrimination. The discharges were made pursuant to section 1123 of the New York City Charter, the very same section involved and construed by the New York Court of Appeals in the *Gardner* case, *supra*. The Second Circuit held that the *Gardner* opinion destroyed the basis for the prior district court decision to abstain and hence went on to decide the case on the merits, stating:

> "The district court abstained from deciding this issue on the ground that the Section should first be construed by the state courts. Cf. *Holland* v. *Hogan*, 67 Civ. 1223, decided June 27, 1967 (statutory three-judge court). After the district court's decision and while the present appeal was pending the New York Court of Appeals decided the case of Gardner v. Broderick, NY2d, NE2d, N.Y.S. 2d —— (1967), the opinion in [sic] which authoritatively construed Section 1123. The *Gardner* case removed any ground there may have been for federal abstention."

If plaintiffs are forced to institute an action in state court, the outcome is now certain and this Court will still ultimately be confronted with the question of that statute's constitutionality. Hence in the language of this Court in *Baggett* v. *Bullitt*, 377 U. S. 360, 375-376 (1964), state construction of 103-b would not "avoid or fundamentally alter the constitutional issue raised in this litigation". Accordingly, the abstention doctrine is no longer applicable (if it ever was) and can only create delay in determining plaintiffs' rights and results in needless expenditure of time, energy and money for all concerned. Similarly since the facts are not in dispute and this Court has the benefit of the views of the district court herein that the statute may be construed constitutionally as well as that of the New York Court of Appeals as to the constitutionality of the statute, nothing would be gained and much time, energy and money would be lost by remanding the case back to the district court.

B. *The Nature of the Right Involved.* We are dealing with plaintiffs' rights against self-incrimination. The rationale for constitutional protection of these rights was set forth by this Court in *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 55 (1964):

> "The privilege against self-incrimination 'registers an important advance in the development of our liberty—"one of the great landmarks in man's struggle to make himself civilized." ' Ullmann v. United States, 350 U. S. 422, 426, 100 L.ed. 511, 518, 76 S. Ct. 497, 53 ALR 2d 1008. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear

that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev, 1961), 317; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' United States v. Grunewald, 233 F2d 556, 581-582 (Frank, J., dissenting), revd 353 U. S. 391, 1 L.ed 2d 931, 77 S.Ct. 963; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' Quinn v. United States, 349 U. S. 155, 162, 99 L.ed. 964, 972, 75 S.Ct. 668, 51 ALR2d 1157."

The district court opinion raises the question whether federal litigation concerning statutes allegedly impinging upon this fundamental right can simply be shunted to a state court under the abstention doctrine. In earlier cases this Court has held that federal suits to protect fundamental constitutional rights, particularly when brought as this suit was under the Civil Rights Act, 42 U.S.C. Section 1983, are not subject to the abstention doctrine regardless of what remedies are available in the state court. Thus in *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961) this Court stated:

"It is no answer that the State has a law which if enforced would give relief. The *federal remedy* is *supplementary* to the *state remedy*, and the latter *need not be first sought and refused before the fed-*

> *eral one is invoked.* Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is *no barrier* to the present *suit in the federal court.*" (At page 183) (emphasis added).

Similarly in *McNeese* v. *Board of Education,* 372 U. S. 668, 674 (1963) this Court stated:

> "We have, however, in the present case no underlying issue of state law controlling this litigation. The right alleged is as plainly federal in origin and nature as those vindicated in Brown v. Board of Education, 347 US 483, 98 L ed 873, 74 S Ct 686, 38 A.R. 2d 1180. Nor is the federal right in any way entangled in a skein of state law that must be untangled before the federal case can proceed. For petitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law. Monroe v. Pape, supra (365 US at 171-187). Such claims are entitled to be adjudicated in the federal courts."

The *McNeese* case quoted with approval *Stapleton* v. *Mitchell,* 60 F. Supp. 51, 55 (D. Kan. 1945):

> "But, where as here, fundamental human liberties are drawn in issue, the Federal courts are a proper forum for the determination of the question whether a state statute trespasses upon an area which the Federal Constitution has set apart as hallowed grounds for expression of democratic ideas. We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction

simply because the rights asserted may be adjudicated in some other forum."

See also *Dombrowski* v. *Pfister*, 380 U. S. 479, 485-487 (1965); *Harman* v. *Forssenius*, 380 U. S. 528, 537 (1965).

We submit that the applicability of these precedents to the instant situation should be considered by this Court in order to determine whether the constitutional right against self-incrimination is so fundamental as to preclude applying the abstention doctrine in cases involving it.

C. *The Construction of the Statute.* The District Court opinion frankly admitted that were there no conceivable construction of 103-b which could save it constitutionally, then the abstention doctrine should not be applied. As the District Court opinion subsequently stated, that court considered that it was possible to construe the statute in a constitutional manner.

Thus inherently bound up with the entire abstention question is the question of the constitutionality of 103-b. Before the District Court could have reached its decision to abstain, it first had to decide that the New York courts could arrive at a constitutional interpretation of that statute. What the District Court did, therefore, was to reach a conclusion on the merits, albeit in the guise of a decision to abstain.

Further, 103-b is on its face clear. The sole reason for judicial construction of the statute is the very substantial constitutional doubt raised by the decisions of this Court to be discussed in "2" below. For a federal court to abstain pending state interpretation of the statute under these circumstances becomes a useless and wasteful procedure. All that the state court can do is to guess

what this Court would require in order to save the statute's constitutionality. See *Federal Question Abstention: Justice Frankfurter's Doctrine in An Activist Era*, 80 Harv. L. Rev. 604, 616-617 (1967).

D. *Plaintiffs' Irreparable Injury.* One factor virtually forgotten by the District Court was the irreparable injury which will be suffered by plaintiffs unless and until section 103-b is declared unconstitutional. Some of this injury is readily apparent. Presumptively their corporations are precluded from entering into any contract with the State of New York and its multitudinous local self-governing entities. It is incalculable what business plaintiffs' corporations would have received had they been allowed to bid on the multitudes of contracts available for public bidding in the State of New York. A measure of the seriousness of this damage is the contracts to supply the New York City institutions, each one of which is worth thousands of dollars, which will be coming up month after month for a five-year period and on all of which plaintiffs' corporations will be unable to receive awards.

Just as irreparable is the fact that plaintiffs have been rendered virtually unemployable. If a plaintiff sought to become an officer or director of another corporation, that corporation would be faced with the unhappy dilemma of either not hiring the plaintiff or foregoing state and city business for a five-year period.

To compound plaintiffs' difficulties, their only relief appears to be a speedy adjudication by a federal court. Under New York State law, it is dubious whether a corporation wrongfully deprived of the right to receive a public contract has any remedy for damages against the

public contracting agency. *Matter of Allen* v. *Eberling*, 24 A.D. 2d 594 (1965); *Carol-Ratner Corp.* v. *City Manager of New Rochelle* (Supreme Court, Westchester County, N.Y.L.J., Sept. 14, 1967, p. 20).

Likewise this Court in *Monroe* v. *Pape*, 365 U. S. 167 (1961) has held that the Civil Rights Act does not afford an injured plaintiff the right to receive damages from a city infringing his constitutional rights. Instead all he can receive under that Act is his damages from the individual public officials who effected the denial of his constitutional rights. Thus if plaintiffs are correct in their contention that 103-b is unconstitutional, the only monetary remedy they may have is the right to pursue their claims for damages against a host of civil servants whose ability to pay such damages would be uncertain.

Finally, the invocation of the statute has been coupled with widespread press publicity linking the names of plaintiffs with the extravagant charges of the District Attorney and implying that the exercise of plaintiffs' constitutional rights meant guilt. Indeed the *New York Post* in an editorial even equated the bringing of this action with guilt. Thus in addition to all the other irreparable damage inherent in section 103-b, plaintiffs and their corporations have suffered irreparable injury to their public reputations with incalculable effect upon their businesses and even to their rights to a fair trial in the event the District Attorney ever brings his charges to trial.

This Court has indicated that delay causing irreparable injury to plaintiffs is grounds for not applying the abstention doctrine. *Harman* v. *Forssenius, supra*; *Dombrowski* v. *Pfister, supra*; *Baggett* v. *Bullitt, supra*.

E. *The Current Status of the Abstention Doctrine.* In a number of recent decisions many of which have heretofore been cited, this Court has rejected application of the abstention doctrine and with increasing regularity limited its application. Abstention is now such a limited and restricted doctrine that its continued validity in any case is open to question. A recent comment on this doctrine reached the following conclusion:

> "What is not clear is whether abstention in its truncated state is worth saving. Some say its demise is overdue.
>
> "The question remaining is whether abstention is really useful in those cases standing outside all the exceptions: those non-civil rights, non-vagueness cases where a decision on an unclear issue of state law might obviate the need for a difficult constitutional decision and where the state-law and constitutional issues are not simply different verbalizations of the same concepts. State-court adjudication in such cases might make it unnecessary for either the state or federal courts to reach the constitutional issues, albeit at great additional costs in time and money to the litigants. The price, barring exceptional circumstances, seems a bit high, especially since the Supreme Court's control of its own docket could prevent at least that body from being overwhelmed by what in any case would probably be a minor increase in the number of constitutional decisions. In addition, any contribution abstention makes to federal-state harmony is probably minimal; in fact it could be argued that abstention increases rather than minimizes friction. Even though the Constitution and state law take different approaches to the problem, they still must be reconciled. Since the district court retains jurisdiction, abstention

creates a system in which states must interpret their law under the continuing threat of federal intervention. If the federal court were to move first, the state would at least be warned of the constitutional limits within which it must act before the case reaches its courts. Such clear-cut and immediate exertion of federal power may be less frustrating to the states than the uncertainty abstention engenders. And if, in the particular case, the constitutional issue is so touchy that it should be avoided at all costs, doctrines of ripeness and standing, or an exertion of equitable discretion to dismiss the complaint, would allow the federal court to dispose of the troublesome issues without risk of their returning later in the same form. In addition, abolition of the doctrine would deprive federal trial judges of one means of avoiding decision in unpopular cases, as some no doubt have done. It is impossible to predict whether the Supreme Court will undertake a frontal assault on abstention. But if the doctrine is to be salvaged, either legislation or a clear-cut statement of applicable criteria by the Court is necessary to make it workable in the present activist era." Federal Question Abstention. Justice Frankfurter's Doctrine, In An Activist Era, 80 Harv. L.Rev. 604, 622 (1967).

We submit, therefore, that this case presents an ideal vehicle for this Court to consider whether there is any vitality left to the abstention doctrine whatsoever.

2. The Constitutionality of Section 103-b

Section 103-b allows prosecutors (1) to coerce persons to testify against themselves upon pain of losing the right to do business with any public agency in the State of New York for five years; and (2) to penalize persons availing

themselves of their constitutional rights not to incriminate themselves by depriving them of the right to do business with all New York public agencies for a five-year period. We submit, that such a statute is unconstitutional in the light of this Court's decisions in *Garrity* v. *New Jersey*, 385 U. S. 493 (1967) and *Spevack* v. *Klein*, 385 U. S. 511 (1967). In this connection the District Court recognized that these decisions "have engendered difficult and substantial questions about the constitutionality of Section 103-b" and that such issues "cannot be resolved by resort to the facile but question-begging generalizations that the award of a public contract is a privilege rather than a right or that the state is acting in its proprietary, rather than its sovereign, capacity". These considerations motivated the District Court to apply abstention. We have demonstrated in "1" above why abstention is not a proper answer to the issues raised by this action. Once eliminating abstention as a possible alternative, the District Court opinion becomes a declaration that important constitutional questions meriting decision by this Court are raised in this litigation.

In this connection these issues cannot be avoided or resolved by the strained construction the Corporation Counsel would place upon 103-b. The Corporation Counsel would not make 103-b an automatic bar. Instead, despite the statute's clear language, he would imply a burden of appearing before a Board of Responsibility upon a corporation whose officers and directors exercise their constitutional rights not to incriminate themselves. The experience of Dairymen's League indicates that such a Board of Responsibility is simply the Grand Jury in another guise,

albeit without the power to grant immunity. Here the prosecutor's questions are posed for him by the members of the Board armed with the sanction that if the answers of the witness do not please them or if the witness refuses to answer in full his corporation can be debarred from a contract it would otherwise have received.

But even if we did not have the example of the Dairymen's League before us, such a procedure would still be unconstitutional. First the Acting Commissioner of Purchase own language indicates that what he is doing is giving the persons who exercised their constitutional rights the right to "explain the refusal". In other words the witness is called upon to justify his exercise of rights guaranteed him by the United States Constitution. Thus the City's own choice of language indicates the burden it seeks to impose upon the exercise of constitutional rights. See *Hoffman* v. *United States*, 341 U. S. 479 (1951).

Secondly, Boards of Responsibility, as Mr. Lipton indicated at the oral argument below, are convened only on rare occasions. The Corporation Counsel's interpretation would divide persons seeking to do business with the city into two categories. Those whose officers and directors have chosen to exercise a constitutional right and those who have not (including those who may not even have been asked to do so). Those who have not exercised their constitutional right will presumably be granted contracts for which they are the low bidder. But those whose officers and directors have exercised their constitutional rights will not be given any contract no matter how low their bid unless and until they satisfy a Board of Responsibility that they are responsible bidders. Thus, taking the Corporation Counsel's interpretation in its most fa-

vorable light, he is changing the statute from a declaration that persons availing themselves of constitutional rights *will not* receive public contracts because of that exercise to a statement that persons exercising constitutional rights *perhaps may not* receive public contracts because of the exercise of that right. But, under either interpretation a penalty is being imposed upon persons exercising their constitutional rights which is not imposed upon all others. Consequently, anyone considering whether or not to exercise his constitutional rights against self-incrimination must also consider the possible effect such an exercise might have on his right to receive public contracts.

We submit that such an interpretation does not avoid unconstitutionality under this Court's decision in *Harman* v. *Forssenius*, 380 U. S. 528 (1965). In that case Virginia required persons trying to exercise their 24th Amendment right not to pay a poll tax in a federal election to submit an affidavit of six months' residence. This Court stated in striking down that law that "it need only be shown that it imposes a material requirement solely upon those who refuse to surrender their constitutional right". The Corporation Counsel is imposing the material requirement of satisfying a Board of Responsibility upon those who exercise their constitutional rights while failing to impose any similar requirement on those who either do not choose to avail themselves of such rights or are not faced with such a choice. In the language of *Garrity* this is a manifest attempt to "condition by the exaction of a price" the exercise of "rights of a constitutional stature".

We submit, therefore, that either by its express terms or under the interpretation of either the New York Court of Appeals or the Corporation Counsel, Section 103-b is

still unconstitutional and that in any event, as recognized by the District Court, the question of its constitutionality, in the light of this Court's decisions, certainly raises material and substantial issues for review by this Court.

3. The Issues Raised by the District Attorney's Conduct

Even if we assume *arguendo* that 103-b is constitutional, the case is still not disposed of. The District Attorney, except in three instances which occurred after the institution of this litigation, has failed to indicate to the witnesses before the Grand Jury facts sufficient to indicate that 103-b was applicable. In virtually *all* cases the District Attorney has refused to grant limited waivers restricted to transactions or contracts with public agencies but instead insisted upon waivers totally unlimited in scope. Thus what is in question is not only the constitutionality of 103-b but the conduct of the District Attorney impairing the constitutional rights of witnesses not to incriminate themselves. His conduct finds no protection under the color of a state statute. Even assuming *arguendo* that a state by statute has a right to debar persons from doing business with public agencies, because of their exercise of their constitutional rights, it does not follow that a District Attorney, ignoring the specific language of such a statute, might by himself further and more extensively abrogate such rights by the device of purporting to act under that state statute. We contend that 103-b is unconstitutional. But even more oppressive would be punishment of persons exercising their constitutional rights imposed by the actions of the District Attorney which are not checked either by the limitations contained in the statute or by the opportunity for judicial review.

Although the facts of the District Attorney's overreaching were virtually conceded by the District Attorney at the oral argument and are graphically demonstrated by the Grand Jury minutes submitted to the District Court under seal after the oral argument, the District Court completely failed to discuss this issue.

We submit that if this Court finds 103-b to be constitutional it then must resolve the question of whether the District Attorney can take the constitutional rights of plaintiffs into his own hands without benefit of an authorizing state statutes. Such an issue is in the light of *Spevack* and *Garrity* a novel and important issue of constitutional law.

Conclusion

The appeal herein raises substantial issues requiring plenary consideration by this Court, with briefs on the merits and with oral argument for their resolution.

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Respectfully submitted,

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APPENDICES